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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO JAVIER VASQUEZ, Defendant and Appellant.	B234565 (Los Angeles County Super. Ct. No. BA360792)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steve D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

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Francisco Javier Vasquez appeals from a judgment sentencing him to a term of 29 years for assault on a peace officer, consecutive to four concurrent terms of life, plus 20 years for four attempted murders of a single civilian victim. Appellant contends (1) the imposition of four concurrent life sentences for the attempted murder convictions violates the Penal Code section 654 prohibition of multiple punishments for a single act, and (2) his sentence constitutes cruel and unusual punishment under state and federal law.[1]

We affirm.

FACTS

On August 23, 2009, at approximately 2:00 a.m., the civilian victim was driving eastbound on 33rd Street near Compton Avenue in Los Angeles. Appellant backed his vehicle out of a driveway in front of the victim, temporarily blocking his path. After passing appellant's vehicle and driving for about a block, the victim noticed appellant's vehicle following him closely. At 41st Street and Compton Avenue, appellant fired a gunshot at the victim. Four blocks later, appellant fired a second shot at the victim. Seven blocks after that, appellant fired a third shot at the victim.

The victim then drove to the Newton police station about 10 blocks away and parked in the employee parking lot. Appellant stopped at the parking lot entrance. Two police officers standing in the lot saw appellant fire approximately five gunshots at the victim. Appellant appeared to fire at the officer standing in front of the victim. The two officers jumped into a patrol car, chased appellant, and arrested him a few blocks away. Bullet holes were found in the driver's side door, in one of the seats, and in the taillight of the civilian victim's vehicle.

PROCEDURAL HISTORY

Appellant was convicted of four counts of attempted willful, deliberate, and premeditated murder (§§ 664, 187, subd. (a); counts 3, 7, 9 & 11); four counts of shooting at an occupied motor vehicle (§ 246; counts 4, 8, 10 & 12), and one count of

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[1] All further statutory references are to the Penal Code.

assault on a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2); count 5).[2] The jury found true the special allegation that appellant personally and intentionally discharged a firearm in the attempted murder counts and in the assault on a peace officer. Appellant was sentenced to an upper term of 9 years with a 20-year firearm enhancement for the assault on a peace officer (count 5), followed by a consecutive term of four concurrent sentences of life, plus 20 years for the four attempts to kill the victim (counts 3, 7, 9 & 11). The trial court stayed sentencing on the remaining counts pursuant to section 654 (counts 4, 8, 10 & 12).

DISCUSSION

1. Section 654

Appellant contends that the trial court should have stayed three of the four concurrent life sentences imposed for the four attempted murder counts pursuant to section 654 because all four convictions arose from acts furthering the single objective of attempting to kill the victim.[3] Respondent contends that because each conviction resulted from a separate volitional act divisible by time and intent, the sentencing court properly denied defendant's request to stay the sentences. A section 654 analysis requires us to consider whether appellant fired each gunshot in furtherance of a single intent and objective, or multiple intents and objectives. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1208 (*Latimer*).)[4]

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[2] Counts 1 and 2 were dismissed prior to trial. There is no count 6 in the amended charges.

[3] Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

[4] *Latimer* follows *Neal v. State of California* (1960) 55 Cal.2d 11, which the Supreme Court subsequently overruled in *People v. Correa* (2012) 54 Cal.4th 331, 344

The trial court denied appellant's stay request, finding that the four attempted murder counts "were independent of each other . . . not merely incidental to each other. They might have had similar objectives, but they were separate objectives." The court further reasoned that the shootings were at different locations and the appellant had time to contemplate his actions in between each of the shootings.

We review the facts surrounding a section 654 challenge under the substantial evidence standard of review. "'The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial.' [Citations.] '[T]he law gives the trial court broad latitude in making the determination.' [Citation.]" (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1215.) However, when the facts are undisputed, the applicability of the statute to facts – the dimension and meaning of the statute – is a question of law. (*People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5 (*Perez*); *People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 816.)

Section 654 applies when a defendant is punished multiple times for a single "act or omission." (*People v. Siko* (1988) 45 Cal.3d 820, 823.) "'Whether a course of criminal conduct is divisible and gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*Latimer, supra*, 5 Cal.4th at p. 1208.) Section 654 protects defendants against multiple punishments, not multiple convictions. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) When section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions that implicate multiple punishment. (*Correa, supra*, 54 Cal.4th at p. 337.)

Facts very similar to the present case were at issue in *People v. Trotter* (1992) 7 Cal.App.4th 363 (*Trotter*). There, the defendant stole a taxi and was subsequently

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(*Correa*). For reasons explained *post*, we do not apply *Correa* in this case because the criminal conduct occurred prior to the *Correa* decision.

chased by a police cruiser on the freeway. While being chased, defendant fired a gunshot at the officer's vehicle. About a minute later, defendant fired a second shot at the officer's vehicle. Seconds after the second shot, he fired a third shot at the officer's vehicle. Defendant was convicted of three counts of assault on a peace officer with a firearm, one for each gunshot. (*Id.* at pp. 365-366.)[5] The appellate court held that the trial court correctly punished defendant separately for two of the three assaults.[6] The court noted that the gunshots constituted separate and distinct acts. Defendant had time prior to each shot to "reflect and consider his next action." (*Id.* at p. 368.)

As in *Trotter,* here substantial evidence supported multiple sentences for the separate attempted murder counts. Appellant fired at least four shots while chasing the victim. The shots were each separated in distance by several blocks. One purpose of section 654 "is to insure that a defendant's punishment will be commensurate with his culpability." (*Perez, supra,* 23 Cal.3d at p. 551.) Appellant had the opportunity to reflect upon his actions between each shot; thus, each shot increased appellant's culpability and indicated a separate intent to kill the victim. (Cf. *People v. Surdi* (1995) 35 Cal.App.4th 685, 689.) Appellant "'should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . behavior.' [Citation.]" (*Trotter, supra,* 7 Cal.App.4th at p. 368.) As in *Trotter,* each shot appellant fired "required a separate trigger pull," and was not "spontaneous or uncontrollable." (*Ibid.*)

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5 The trial court sentenced defendant for the first and second shots but stayed the sentence resulting from the third shot. (*Trotter, supra,* 7 Cal.App.4th at p. 365.) On appeal, only the sentence resulting from the second shot was at issue. (*Id.* at p. 366.) The appellate court did not discuss whether two gunshots fired seconds apart would warrant separate sentences.

6 The *Trotter* court stated in dictum in a footnote, "the intent and objective test is controlling, and if defendant intended to kill with each assault it could be argued multiple punishment would be precluded." (*Trotter, supra,* 7 Cal.App.4th at p. 368, fn. 4.) The court, however, concluded that although the intent is "the same in kind," it may be considered separate when separated by pauses. (*Ibid.*)

Our Supreme Court decided *Correa, supra*, 54 Cal.4th 331, after briefs were filed in this case. There, a SWAT team found seven rifles and shotguns in defendant's closet. Defendant was convicted of seven counts of being a felon in possession of a firearm and was sentenced to seven consecutive terms for those offenses. (*Id.* at pp. 334-335.) Our Supreme Court concluded that "section 654 does not bar multiple punishment for violations of the same provision of law." (*Id.* at p. 344.) Based on section 654's plain language and legislative history, the court concluded that it was never intended to apply to a single act constituting multiple violations of the same criminal statute. "By its terms section 654 applies only to '[a]n act or omission that is punishable in different ways by *different* provisions of law . . . .'" (*Correa*, *supra*, at p. 341.)

We do not apply *Correa* here because the *Correa* court held that the ex post facto clause of the United States Constitution barred applying this new rule to the defendant in that case. (*Correa, supra,* 54 Cal.4th at pp. 344-345.) Because appellant's crimes took place before *Correa* was decided, the ex post facto clause would bar us from applying this new rule.[7] Regardless, because we hold that appellant's actions constitute separate criminal acts, as opposed to one act subject to multiple sentencing, it is unnecessary for us to apply *Correa*'s new rule to our facts.

In short, because appellant engaged in separate attempts to murder the victim that can be distinguished by time and place, we agree with the trial court that separate punishments are appropriate.[8]

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[7] An unforeseeable retroactive judicial enlargement of a criminal statute has the same effect as an ex post facto law. (*People v. Morante* (1999) 20 Cal.4th 403, 431; *People v. Davis* (1994) 7 Cal.4th 797, 811.)

[8] Appellant's reliance on *People v. Bauer* (1969) 1 Cal.3d 368, 376-377 is misplaced. There, the court held taking several items during a robbery may not support separate sentences. Here, no robbery occurred and appellant's conduct, as explained, supported multiple sentences.

2. Cruel and Unusual Punishment

The question of whether a punishment is unconstitutionally cruel or unusual is a question of law. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.) However, we view the underlying facts in the light most favorable to the judgment. (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1390.)

Appellant was convicted of four counts of attempted murder, one count of assault on a peace officer with a semiautomatic firearm, and four counts of shooting at an occupied motor vehicle. He contends that his sentence of 29 years consecutive to four concurrent terms of life, plus 20 years constitutes cruel and unusual punishment under the United States and California Constitutions. Appellant contends that his crimes were not vicious or atrocious as a matter of gravity in that he did not "target a particular individual or a group of individuals." He also contends that while the crimes at issue in this case are "obviously serious," they "cannot be considered to be of the more 'vicious' or 'atrocious' variety that would justify what may well be a life sentence in this case." We disagree.

The California Constitution prohibits cruel or unusual punishment.[9] A sentence violates the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) Defendant must overcome a large burden in order to show his sentence is disproportionate. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1197.) In order to determine a sentence's disproportionality, we must examine the nature of the offense and the offender. (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) We are permitted to, but need not, compare the offense and its punishment with punishments imposed for the same offense in other jurisdictions. (*Id.* at p. 487.)

Here, appellant fired at least eight gunshots in the direction of other people, including at least one police officer, and endangered many lives in the residential

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9 "Cruel or unusual punishment may not be inflicted or excessive fines imposed." (Cal. Const., art. I, § 17.)

neighborhood where these crimes took place. The Legislature has determined that willful, deliberate, and premeditated attempted murder carries a life with the possibility of parole sentence. (§ 664, subd. (a).) Appellant was convicted of four of these counts, and the trial court properly exercised its discretion to run them concurrently and to run the assault against a peace officer charge consecutively. (See § 669, subd. (a).) His sentence was not cruel and unusual under the California Constitution. (See, e.g., *People v. Riva* (2003) 112 Cal.App.4th 981, 986 [sentence of 30 years to life held not cruel and unusual for shooting at an occupied vehicle and causing great bodily injury]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1221-1222 [sentence of 40 years to life held not cruel and unusual for attempted murder, mayhem, and assault with a firearm by a defendant who was 17 at the time of the crimes]; *People v. Morales* (1992) 5 Cal.App.4th 917, 930 [life sentence for one count of attempted murder held not cruel and unusual].)

The Eighth Amendment of the United States Constitution counsels a similar analysis.[10] Punishments are examined according to a narrow proportionality principle. (*People v. Meeks* (2004) 123 Cal.App.4th 695, 707.) That principle bars imposition of a punishment that is grossly disproportionate to the severity of the crime. (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1135.) A proportionality analysis considers three criteria, including (1) the gravity of the offense and the harshness of the penalty; (2) the sentence imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. "'[I]t is only in the rare case where a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality that the second and third criteria come into play.' [Citation.]" (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1088.)

As discussed above, appellant engaged in serious and deadly crimes that could have resulted in the loss of several lives. The fact that no one was actually injured does not diminish the seriousness of the offense. (See *People v. Morales, supra*,

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10 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const., 8th Amend.)

5 Cal.App.4th at p. 930.) Given the nature of appellant's offenses, his sentence does not qualify as cruel and unusual punishment under the United States Constitution. (See, e.g., *Harmelin v. Michigan* (1991) 501 U.S. 957, 1009 [rejecting Eighth Amendment claim of defendant with no prior felony record who was convicted of possessing 672 grams of cocaine and received life sentence without the possibility of parole]; *Rummel v. Estelle* (1980) 445 U.S. 263, 285 [rejecting Eighth Amendment challenge to life sentence with the possibility of parole for obtaining $120.75 under false pretenses, where defendant had prior convictions for passing a forged check and fraudulent credit card use]; *Plascencia v. Alameida* (9th Cir. 2006) 467 F.3d 1190, 1193 [holding a consecutive 25-year-to-life sentence on a gun enhancement not cruel and unusual].)

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

BIGELOW, P. J.

GRIMES, J.